UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, Plaintiffs,	)	
vs.	)	Civil Action No. 25-10276-GAO
CHARLES EZELL, ACTING DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, et al, Defendants.	)	

BEFORE: THE HONORABLE GEORGE A. O'TOOLE

MOTION HEARING

John Joseph Moakley United States Courthouse
Courtroom No. 22
1 Courthouse Way
Boston, MA 02210

February 10, 2025
2:03 p.m.

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APPEARANCES:

For the Plaintiffs:

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For the Defendants:

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PROCEEDINGS

THE CLERK: All rise. Court is now in session. Your Honor, this is Civil Matter of 25-cv-10276, American Federation of Government Employees, AFL-CIO vs. Ezell, et al., motion hearing.

Would the parties identify themselves for the Court and the record beginning with the plaintiff, please.

MS. GOLDSTEIN: Elena Goldstein for the Democracy Forward Foundation for the plaintiffs.

02:03PM MR. McGRATH: Daniel McGrath for the Democracy Forward Foundation for the plaintiffs, your Honor.

MR. ANDERSON: Michael Anderson, Murphy Anderson for the plaintiffs.

MS. SUSZCZYK: Sara Suszcyk for National Association of Government Employees, Inc., plaintiff.

MR. HAMILTON: Good afternoon, your Honor, Eric Hamilton, Deputy Assistant Attorney General, the Civil Division, Department of Justice for defendants.

MR. GARDNER: Good afternoon, your Honor, Josh Gardner 02:03PM for the United States Department of Justice on behalf of the defendants.

MR. ALTABET: Good afternoon, your Honor, Jason Altabet with the Department of Justice on behalf of the defendants.

MR. FARQUHAR: Good afternoon, your Honor,

Ray Farquhar, United States Attorney's Office for defendants.

THE COURT: Good afternoon. The earlier submission was a request for a temporary restraining order. I think it's more proper now at this point where there's an issue joined on both sides that we can refer to it as a preliminary injunction question. I don't think there's any substantive difference with the label.

Everybody is being heard on both sides, just so there's no ambiguity about that. One thing -- never mind. For the plaintiff.

02:04PM

MS. GOLDSTEIN: Good afternoon, your Honor, and may it please the Court.

THE COURT: Good afternoon.

MS. GOLDSTEIN: And I represent the plaintiffs. Over the course of the last two weeks, confusion has reigned for millions of career civil servants after defendants rationally delivered an ultimatum to nearly all federal workers, resign within 10 days or face the prospect of unemployment without compensation.

02:05PM

OPM's directive, which they entitled, "Fork In The Road," stunning the architect. OPM issued it in federal fashion without even a cursory consideration or an analysis of which portions across hundreds of federal agencies were no longer needed or which positions were vital to government functioning or to the ramifications of continuing functioning

of government of a nearly unsolicited application for resignations.

What's more, the directive unlawfully committed the government to expending funds to pay for resigning employees six months past the conclusion of existing appropriations, and OPM continues to unequivocally assure employees that they will be paid for this time period if they resign, notwithstanding this administration's efforts to shutter existing agencies and uncertainty about forthcoming appropriations.

02:06PM So to understand this slap shot about defendant's actions, one need only look at the constantly changing nature of OPM's guidance here and the representations to the employees that they are asking to resign, changes to the very contours of the program.

Take work requirements as one example, your Honor. At first, defendants informed millions of employees by mass email that they would be exempted from in-person, in-office work requirements until September 30th if they submitted a deferred resignation.

02:07PM Within a day or two, employees were told that they would only have to work in rare, though unspecified circumstances, and days later, on February 1st, defendants shifted position yet again to say that, no, resigning employees would not have to work during their deferred resignation period, however, since just February 1st, this guidance

continues to change, and reporting has indicated that at the IRS, for example, employees, including those who have already accepted the deferred representation program, are being told that they must work until the middle of May.

These changes have been communicated to employees in uneven fashion, often just put in buried FAQs on OPM's website or in memoranda addressed to agency heads. But every indication from the past 10 days or two weeks suggests that defendants may continue to change the terms of their ultimatum right up until the last moment before the short fuse deadline that they've set for millions of workers today.

Plaintiffs in their role as unions, their core organizational mission is about counseling and advising their members and their affiliates, and plaintiffs have unsurprisingly been inundated with requests for guidance from their members and affiliates as a result of the shifting and chaotic process.

They've deferred unrecoupable resources responding to these inquiries and harmed their mission and the changing and slap shot guidance from defendants likewise undermines their ability to counsel their members, and they will lose more members if that exploding deadline is reinstated by the Court.

Today, as this deadline approaches --

THE COURT: Why would they lose more if the time is extended? There's more opportunity for people to change their

minds and sign up for it?

MS. GOLDSTEIN: Your Honor, the nature of the ultimatum is designed to, and as the facts in the record reflect, increase the number of those employees who accept this under the high pressure terms of just that two-week period.

As the evidence in the record reflects, those numbers have increased dramatically as that deadline comes to a point, and that is indeed the point of having only a two-week or 10-day period for employees to respond.

02:09PM In addition, right now, employees don't know what they are accepting, and it is very likely that to the extent that plaintiffs are able to fulfill their organizational mission of providing clear advice and counsel about what it is that employees are actually accepting, that fewer folks, particularly accepted from this slap shot exploding deadline, would accept that offer.

Accordingly, your Honor, as this deadline approaches in mere hours, we ask only for modest relief that this Court continue to pause the deadline for folks to accept this

02:09PM deferred resignation offer and that defendants immediately communicate that stay to all federal employees.

In addition, we ask that defendants cease soliciting and encouraging other agents either directly or indirectly from through other agencies soliciting individuals to take advantage of this program while this Court considers the merits.

I'm happy to answer questions, your Honor, or go through some of the major questions in the case.

THE COURT: Go ahead.

MS. GOLDSTEIN: Thank you, your Honor. So one of the questions here, your Honor, is whether or not defendants have overcome the strong statutory presumption in favor of reviewability offered by the Administrative Procedure Act. They have not.

What defendants are arguing here is that Congress has implicitly precluded plaintiffs from bringing their action in federal court. They aren't arguing that Congress has expressly intended to staff them because they can't, and I think all parties agree that there is no expressed implication from Congress that plaintiffs's claims are precluded, so they're arguing that Congress impliedly intended this. That is incorrect.

This is a program of unprecedented magnitude that raises serious questions as to the rationality of eight OPM's decision-making and the legality of that decision-making that has caused a deluge of inquiries to plaintiffs's unions and irreparable harm to them as organizations.

This is not what Congress intended to preclude through the Civil Service Reform Act administrative schemes that it set up, and I think to understand that, it's helpful to talk a little bit about what Congress really did intend with respect

to those administrative schemes.

There are two of them under the Civil Service Reform Act or CSRA. The first is the Merits Systems Protection Board or the MSPB, so the MSPB is set up to hear claims from covered employees about covered adverse employment action, things like suspensions, terminations, demotions, and the like,

But plaintiffs here are not employees, they are organizations asserting harm to themselves in their capacity as organizations, and the claims here are not about covered employment actions or covered adverse employment actions, they are about the rationality of OPM's decision-making process, they are about the legality of that decision-making process.

And, indeed, defendants argue that there is no adverse employment action here at all because what they proffer is a benefit, not an adverse action, but these claims by plaintiffs are nothing like as in *Feds for Medical Freedom v. Biden*, the claims that are heard through the MSPB.

So what about the second scheme, that is the scheme involving the Federal Labor Relations Authority or the FRLA. The FRLA hears collective bargaining disputes between agents that employ employees and unions as their representatives of their members, of those employees employed by those agencies.

But, here, plaintiffs are asserting their claims are not in the representative capacity but as organizations that are being harmed and the agencies that they have collective

bargaining with, those are not in this case, and those, they cannot seek relief there.

This is a program that was promulgated by OPM, that OPM sent directly more than 2 million federal civil servants, and OPM directed those civil servants to reach directly back out to OPM. But plaintiffs don't have collective bargaining agreements with OPM, and OPM is not acting in the capacity as the employer of employees. These issues do not involve bargaining, they do not involve the collective bargaining relationship between agencies that employ employees and unions in their representative capacity.

02:13PM

And so for all those reasons, your Honor, this case is not precluded under just the first step of the *Thunder Basin* test. There is no indication that Congress impliedly intended these kinds of cases to go through the MSPB or the FRLA process, and maybe it's helpful to think about a hypothetical.

You can imagine a situation in which let's say the administration decides to shutter the Department of Education, and in so doing, fires all of the individuals who administer federal Pell grants. These are the low income financial assistance that goes to families to help their kids go to college.

02:14PM

Now, if you had a group of families that wanted to challenge the loss of those statutorily required grants, would they be precluded from going to federal court to challenge the

rationale of that decision just because it involved terminations from their upstream? No, your Honor, and so here, too.

Now, even if this Court were to conclude that the first step of *Thunder Basin* that Congress intended to preclude these kinds of plaintiffs in these kinds of situations from going into federal court and availing ourselves of jurisdiction, you go to the second step of the *Thunder Basin* test, and that is a three-question analysis, three equitable factors. All of them here weigh in favor of jurisdiction.

02:15PM

The first question is whether preclusion would take out all meaningful judicial review. First, for the reasons I just gave, that unions cannot avail themselves in their organizational capacity or against this defendant for these kinds of claims.

All of those reasons mean that there is no meaningful judicial relief, but there's a second reason why meaningful judicial review would be precluded absent jurisdiction, your Honor, and that is because of irreparable harm.

02:15PM

As the Supreme Court said in *Axon*, this is a here and now injury, and absent this Court's relief, that injury will be irreparable, and this is unlike the cases that defendants cite, like *Filebark* or *Jalbert*.

THE COURT: Say that again.

MS. GOLDSTEIN: *Filebark*. That was the case where

folks had filed a grievance of their low salaries and then they tried to relitigate those in federal court. There was a pathway for those claims to be heard, unlike here.

So, too, *Jalbert*. That was the case where the SEC, again, there was a pathway of relief that they could have followed through the administrative scheme but chose not to.

So, too, FLEOA. That's the case where the union waited three years to challenge an OPM regulation regarding retirement benefits, and the regulation and the statutory scheme again set up a procedure by which the union could receive and the individuals could receive review of that claim.

02:16PM

So, your Honor, the first factor, meaningful preclusion of judicial review weighs in favor of plaintiffs. So, too, do the last two factors, whether these claims are collateral to the agencies here and whether they are within the agency's expertise.

Defendants urge somehow that a factual record about a particular termination would ultimately help a court decide the merits of this action, but that can't be right. This is not about employees and those kinds of questions, this is about the rationality of OPM's process and the legality of it: Did OPM properly consider history? Did OPM do a proper analysis in sending out this mass resignation solicitation?

02:17PM

This is about the Administrative Procedure act, about the Anti-Deficiency Act, not statutes in which these agencies

have any expertise and not facts relating to individual employment actions.

Your Honor, I'm happy to answer questions about the jurisdictional issue, but if not, I will move on.

THE COURT: All right, go ahead.

MS. GOLDSTEIN: So your Honor asked a moment ago effectively a question about why we need a temporary restraining order right now and wouldn't an extension lead to an increase in the number of folks who are taking, who are submitting their deferred resignation?

02:18PM

I think that's not correct for a few reasons, and I think first it's helpful to review the kinds of irreparable harm that plaintiffs are here alleging, and there are three:

The first is that they have expended unrecoupable resources to respond to the deluge of inquiries regarding this deferred resignation program.

The second is that this has harmed their mission in two ways:

First, it has required diversion of resources away from other core organizational activities, like preparing for arbitrations and bargaining and the like.

02:18PM

And then, second, undermining their mission because they are not able to provide adequate and appropriate advice of counsel to their members and affiliates, again, a core organizational function because of the poor and shifting

information that they're receiving from OPM.

In this way, this case is on all fours with the *Havens Realty* case, which the Supreme Court cited favorably and the *Alliance for Hippocratic Medicine* cases.

In *Havens*, you have plaintiffs who are an organization that were providing counseling, as do plaintiffs in this case, regarding real estate transactions. The harm that they alleged was they were receiving bad, in that case, racist information from the defendants that made it more difficult for them to adequately counsel their clients regarding their purposes of real estate.

02:19PM

It's strikingly similar to this one. You have an organization, and we have an organization. One of their core functions is providing advice and counsel, but defendants provisionally offer poor information or in this case also shifting information, which makes it impossible to fulfill that organizational mission effectively.

And then the third harm, your Honor, is the loss of membership that is triggered by the pressure that comes with that short-term exploding deadline, here, just two weeks for employees to decide a question about their livelihoods.

02:20PM

Now, without a temporary restraining order, your Honor, irreparable harm will continue for several reasons. The first is that the questions will continue that individuals will be asking and affiliates will be asking plaintiffs what is it

that they actually accepted, what are the terms of this deferred resignation program, and that makes sense because OPM appears to be making this up as they are going along.

As set forth in our papers, the contours of this program continue to shift and have continued to shift even in the last several days.

And we can expect to the extent that your Honor would like to put this on for a preliminary injunction hearing after this, we would be happy to provide more factual development about the ways in which this guidance continues to shift.

02:20PM

Your Honor, in addition, defendants argue that this is not final agency action, but, here, two tests for final agency action, is it the consummation of the agency's process and do legal consequences flow?

Defendants don't dispute that this is the consummation of the agency's process, so the question is just whether legal consequences flow from The Fork Directive, and here legal consequences flow from the ultimatum. What the ultimatum does is it effectively divides the federal work force into two categories, two parts of the fork.

02:21PM

On the one hand, you have the folks who have accepted the deferred resignation offer and who are protected from rifts from layoffs and so forth.

On the other hand, for employees who do nothing, they are prioritized for those rifts. They are prioritized for

those layoffs, and in such a way, regardless of whether they accept an offer or not, legal consequence flow to them, but, in many ways, your Honor, defendants seek to have it both ways. One the one hand, they're saying that this program is not final agency action, that it has no effect, but for the tens of thousands of employees who have accepted this purported offer from defendants, they are bound to it, they have no unilateral right to rescind their resignations. They can request a resignation, but that does not remain in their control.

02:22PM The cases that defendants cite are inapposite. You have the *Merrimack Bay* case, your Honor, which concerned agency consultation that was tentative by intention and was going to come later, come final agency opinion. That's nothing like this. There is no tentative nature about this program. Indeed, defendants repeatedly said that they will not, absent this Court's intervention, extend it or pause it in any way.

Likewise, the other case defendants cite, the California case, that was about an agency guidance document that had no legal effect for anyone. That's the opposite of

02:23PM what's happening in this case.

Your Honor, I will not belabor the arbitrary and capricious nature of defendant's actions. I don't think either that defendants are really disputing this, but I will just outline very briefly a couple of the categories of the arbitrary and capricious nature of their action, the first that

they have failed to consider the continued functioning of government in numerous respects, you know, seeking this broad solicitation of resignations without any analysis with respect to who will take it or who should be taking it or how to improve government functioning.

There's been recent reporting cited or cases about, for example, veterans hospitals and how veterans nurses, an in-demand profession, may well choose to go elsewhere leaving these hospitals without the staff that they need to function and to provide essential services.

Second, as I've already talked about the shifting contours of this program, even as they are asking employees to rely on this, quote, "serious questions about their livelihood."

Third, that it is inconsistent with the rules governing outside employment.

Fourth, that it's contrary to historical evidence, both with respect to how this Fork in the Road Directive worked with Elon Musk's private program and private business as well as the historical evidence that when the government wants to downsize, there are ways to do this correctly, to do this with study and analysis and Congressional approval, none of which happened here in the two weeks that they have tried to run this program.

Fifth, that this program, the deadline is arbitrary.

And, lastly, that this is pretext to remove individuals and fill them, fill these positions with folks who are ideologically aligned with this administration.

Next, your Honor, plaintiffs allege that this program violates the Anti-Deficiency Act. They have made an unequivocal promise to individuals who have accepted the deferred compensation offer that they will be paid through September, even past the expiration of the existing appropriations, so that promise is still on the front page of OPM's website, "You will be paid." They continue to double down on that representation.

02:25PM

If you look at their FAQ, your Honor, there's a question that says, "Will I really be paid?" The answer on the FAQ is yes. Now, that is a promise that they cannot make because they cannot -- because the ADA prohibits obligating money like this in the absence of an appropriation, and it's not how other employees are treated.

Typically employees do work for the government for many years as appropriations change, but when Congress does

02:25PM

reduce appropriations or does not provide adequate funding for the government, agencies are forced to furlough individuals, agencies are forced to do reductions, but what defendants have done by making this unequivocal promise to this subset of individuals is to say that they will be exempted from all that.

That's not a promise that they can make. It's not a

promise that Congress is bound by, particularly in light of the fact that defendants are suggesting that some of these agencies be shuttered particularly in light of the fact that Congress may not want to pay workers for doing no work and particularly in light of the purpose of the Anti-Deficiency Act, which is precisely to avoid the executive putting pressure on Congress because they have already obligated funds in the absence of an appropriation.

Your Honor, I am happy to distinguish their cases if that would be helpful or happy to let opposing counsel go and respond after they've gone.

THE COURT: Go ahead.

MS. GOLDSTEIN: Sure. So defendants cite a whole host of cases, mostly arguing that this Court should not exercise jurisdiction here, but those cases have no applicability, largely because they apply in situations involving adverse employee actions and also because they do not involve situations where plaintiffs's labor unions are proceeding in a representative capacity.

The case they seem to rely upon the most is *AFGE*, but that case, which is not binding on this Court, is inapposite for several reasons:

The first is that it did not include an APA claim, and the Administrative Procedure Act includes a presumption in favor of this Court's reviewability.

Indeed, I don't think any of their cases in which defendants rely rely on an Administrative Procedure Act claim and with it its presumption of judicial reviewability.

Second, *AFGE* did not involve unions in their organizational capacity, only in a representational capacity.

And, third, in that case, plaintiffs conceded that they were bound by *Thunder Basin,* Step 1 of the test, so plaintiffs actually conceded that Congress intended them to be precluded unless an exception applies from judicial review.

02:28PM And, fourth, that case involved a whole host of executive orders that were both to be implemented by agencies, the agencies with which the unions have collective bargaining contracts, unlike this situation, which is about OPM and not about the collective bargaining rights of individual agencies, and those executive orders at issue were specifically targeting and about the collective bargaining process. They were about official time and similar kinds of issues, not about this government-wide solicitation of resignations, nothing like this case here.

02:29PM And *AFGE v. Air Force*, your Honor, this is a dress code where a court held that there was no jurisdiction, and that makes sense. With a dress code that was held by one agency, that union could have filed a grievance or could have filed other claims against that agency and obtained relief, but that's not the case here, where OPM, not the agencies with whom

these defendants contract, OPM is the one that is sending out the directive and is promulgating the directive.

FLEOA that I previously mentioned involved waiting three years before folks filed a review request and where the agency scheme had a specific way in which relief could be obtained. I think one case that defendants don't grapple with at all is *NTEU vs. Devine.* This is a case in D.C. Circuit where a union brought a claim, a pre-enforcement challenge like this one to an OPM regulation on appropriation grounds like this, and the D.C. Circuit held that there was jurisdiction.

02:30PM

This case is talked about at length in the *Feds For Medical Freedom v. Biden* case, another case which defendants do not grapple and which stands for the proposition that where government action may have employees somewhere in the background but is not about covered employees challenging covered adverse employment actions, then Congress did not intend preclusion to apply.

Now, one of defendant's main arguments is that, sure, plaintiffs as unions cannot go to these administrative tribunals, but that suggests even more that Congress didn't want them to be heard or to obtain any relief at all, and they cite a number of cases for that proposition, but those cases are all about claims that are coherently inside the CSRA scheme.

02:30PM

So, for example, *Fausto*, that case involved an

individual suspension. Now, if that individual -- that individual did not have procedural due process rights, could not go to the MSPB, it's true, and so the Court held that that individual was precluded from going to federal court because then they would have even more rights than if they were just in a slightly different category of employee within that CSRA program.

It is very different from plaintiffs's challenge to what we are hearing is the directive toady. Plaintiffs are not employees. They are not challenging agency action, and they are not challenging covered adverse employment actions.

Likewise, *Elgin* on which defendants rely, this was a termination for individuals terminated because they didn't want to comply with the statute, but those individuals were challenging their adverse employment action, not a government-wide policy promulgated by a separate agency as this one.

And the last one, the *Gordon v. Ashcroft* case, this is the FBI case that involved a letter of censure, that individual couldn't go to the MSPB because the MSPB was too low of a -- not harmful enough or big enough adverse employment action, but, again, you had a covered employee and the kind of action that was contemplated by the MSPB and by Congress in promulgating the CSRA. That is not what you have here.

The last case that I'll mention, which I don't think

is cited in defendant's brief but may come up today is the *Payne* case. That case also considered President Biden's vaccine mandate case, as did *Feds For Medical Freedom* vs. Biden.

Now the Fifth Circuit in *Feds for Medical Freedom v. Biden* concluded that there was jurisdiction including for a union proceeding in its representative capacity because plaintiffs were challenging a government-wide program about vaccines, that it was not about the covered adverse personnel action.

The D.C. Circuit in contrast held that jurisdiction would be precluded, but, there, the plaintiff there, Mr. Payne, was precluded, premised his standing on the fourth coming adverse employment action that he would experience if this policy went into effect, so meaningfully distinguishable, and, in addition, we would argue that the Fifth Circuit has the better of this argument.

Your Honor, I'm happy again to answer questions following opposing counsel's presentation.

02:33PM THE COURT: All right. Thank you.

MS. GOLDSTEIN: But thank you.

MR. HAMILTON: Good afternoon, your Honor. My name is Eric Hamilton. This Court should deny plaintiffs's motion, but before getting into the arguments that support that outcome, I thought I would take a moment to talk about the voluntary

resignation program, why it exists and how it operates.

President Trump campaigned on a promise to reorganize the federal work force, and shortly after taking office, he made two important announcements to the federal work force. One, he announced a change to the remote work policies that had been in effect and said that much of the federal work force would be required to return to in-person work.

Second, he announced he'd be reducing the overall size of the federal government work force and that there would be reductions in force in some federal agencies and departments.

We understand that these announcements may have come as a disappointment to some in the federal work force, and so the voluntary resignation program offers a humane off-ramp to federal government employees who might have structured their life around having a remote work opportunity.

This gives those employees seven months to seek new employment that might still be remote work without having a change to their federal salary and benefits, and we also understand that the announcement of a reorganization of the work force may have come as a disappointment.

Employees not wanting to deal with the uncertainty of that have this also as a main off-ramp to have the certainty of no change to their salary and benefits during the programming.

Turning to the motion, your Honor, this is the rare motion for a temporary restraining order that I think does not

require the Court to even get to the four-element *Winter* test, and the reason is that the relief that plaintiffs propose is legally incoherent and at odds with their theory of their case.

Your Honor, plaintiffs are asking the Court to hold that it is likely that the voluntary resignation program is unlawful, and on that premise, to extend the program out into time. That does not make any sense, and the Court should not consider that possibility. In addition, it is a fundamentally inequitable outcome.

02:36PM Plaintiffs's complaint signals that their plan for the case is for the Court to vacate the voluntary resignation program. In other words, plaintiffs want the Court today to hold open the program, allow continued participation in the program only so that at the end of this case, all of that can be wiped away. That would be inequitable.

Turning though to the four-element test under *Winter* that controls requests for preliminary equitable relief, I want to start with irreparable harm because it is the element that is most obviously absent here.

02:37PM Plaintiffs claim irreparable harm in the form of the questions that they're receiving from their members about how the program works, and they also worry that the program will result in more uptake and then those individuals who choose to participate will decide to end their membership in plaintiffs's unions.

Well, both of those harms would only increase if the Court enters a temporary restraining order that extends the program out into time. It would not mitigate that harm. In addition, I think recognizing the fundamental flaws in their proposed temporary restraining order, plaintiffs have attempted to rework their request in their reply brief attaching to that reply brief a brand new proposed TRO that also asks the Court to enjoin defendants from soliciting participation in the program.

02:38PM Your Honor, that proposal is forfeited, arguments raised for the first time in a reply brief are forfeited, and that is only more true for new proposals for injunctive relief that are raised for the first time in a reply brief.

The proposal that plaintiffs make also doesn't make any sense. They never explain why the Court should act to stop the defendants from soliciting participation in the program but at the same time require defendants to continue to operate the program and permit participation in it.

This suggestion also raises administrability problems. 02:39PM It isn't clear exactly what would and would not qualify for defendants as soliciting resignations. For example, would answering questions about the program to federal government employees constitute solicitation?

I'll turn next to the likelihood of success on the merits. The plaintiffs lack standing here, and I would note

that there's a decision from just Friday on the standing of one of the plaintiffs here, which is the AFL-CIO. This is in the Federal District Court in Washington D.C., and because it's a decision that came after we filed our brief, I'm just going to read it into the record of the case caption. It's AFL-CIO, Department of Labor, Number 1:25-cv-339.

On Friday, Judge Bates held that the AFL-CIO lacked organizational standing to challenge the Department of Government Efficiency's access to Department of Labor data based on the loss of trust with members. The union there claimed that this would result in some change of trust, but that's a very similar theory standing with the one that plaintiffs are relying on today.

02:40PM

They rely on this diversion of resources theory that they are receiving questions about the program, and as a consequence, that is diverting resources. The most important authority on that is the U.S. Supreme Court's very recent decision in *FDA against Alliance For Hippocratic Medicine*. There, an organization similarly claimed that the FDA's approval of a drug would require that organization to study the drug and then for the organization to provide information to its members about that drug's risk.

02:41PM

U.S. Supreme Court held that was not a valid theory of standing, and if that were the case, organizations could will themselves into becoming plaintiffs in federal litigation

through their own conduct, and it's a similar theory to the one plaintiffs rely on here. Their voluntary choice to provide information to their members, it's a self-inflicted harm like the *Clapper* case, and there also is no limiting principle on plaintiffs's theory for standing.

If this really did suffice for standing, changes to, for example, the general schedule pay scales, timekeeping rules, travel and reimbursement policies, and ethics rules would all become reasons for unions to bring litigation in federal trial courts on the idea that those changes generate questions to the union from its members and that those policy changes could conceivably cause employees to leave federal employment and then the unions.

02:42PM

In the end, the unions are the wrong plaintiffs. To the extent federal employees are disappointed with their participation in the voluntary resignation program and have legal claims to submit, those claims should be run through the statutes that Congress established in the CSRA and FSLMRS, which turns to the jurisdictional question on which there is substantial briefing from both sides.

02:43PM

This Court lacks jurisdiction because CSRA and the FSLMRS implicitly preempt plaintiffs's claims. I won't repeat our briefing on that, but I'll just highlight that at bottom. Our argument is that it is absurd that the Congress developed these carefully created schemes for the litigation of claims

between federal employers and their employees about workplace conditions and rules but that Congress would also have wanted federal employee employment unions to be able to come into court on the allegation that they have received questions from their members about a policy and initiate litigation in any federal trial court of their choosing.

Turning to the APA, there is no final agency action here, which is a requirement for every APA action, and that is because the voluntary resignation program does not impose a right or obligation on anyone. That standard is met when something basically has the status of law and a right or obligation would only happen in this context once an employee's participation in the program has been finalized.

Next is the Anti-Deficiency Act. Two points on this, your Honor. Nothing about the voluntary resignation program changes any of the federal government's financial obligations, it simply changes what employees are expected to do or not do during their period of federal employment.

If plaintiffs were right about the Anti-Deficiency Act's application here, your Honor, it would mean that today in February, the federal government could not make an offer to an employee to begin new employment in April, and that offer could not say that an employee would receive a salary from the Federal Government. Surely, that is not the case.

Our second point on the Anti-Deficiency Act is that

compliance with the Anti-Deficiency Act is, of course, implicit in contracts and also the government's representations about the voluntary resignation program. Irreparable harm is another factor under the *Winter* test. Plaintiffs cannot show irreparable harm here because, if anything, the injuries that they claim would only be exacerbated by entry of a temporary restraining order.

The voluntary resignation program was slated to end the day after plaintiffs filed a lawsuit and sought a temporary restraining order. It is only open today because plaintiffs filed this lawsuit. If no injunctive relief is entered, the program will close, and plaintiffs's complaints about the questions they are receiving and the possibility of members joining and leaving their unions will end.

Finally is the balance of the equities as well as the public interest. Both of these elements favor the defendants. Your Honor, equitable relief here would be enormously disruptive for the federal government. The OPM plans to take next steps in its reorganization once this program closes. It needs to close to move forward with its plans, and it also needs this program to close for OPM to engage in the planning that is required to rebalance and reorganize the federal work force.

OPM needs to know who is not and who is not going to participate in the program, and it can't have the answer to

that question as long as this remains open.

Equitable relief would also be hugely disruptive for federal employees. OPM has always expected that most of the uptake would happen in the last 24 to 48 hours of the program, and holding the program open in time into the future would only inject more uncertainty into the program.

Finally is the President's Article II powers in this space because this is in the end a policy about the federal government managing its work force, and for plaintiffs to remake this program into something of their own choosing with a longer participation period and where OPM is prohibited from soliciting participation but must receive participation, that is an intrusion on the Article II interests at stake here.

I'm happy to answer any of your Honor's questions. If there are none, I just conclude by asking the Court to deny plaintiffs's motion.

THE COURT: All right. Thank you. Briefly.

MS. GOLDSTEIN: Thank you, your Honor. Just a few points with respect to opposing counsel's arguments here. First, defendants claim that the plaintiffs have forfeited the ability to request the relief that they now seek, but plaintiffs would have no way of knowing at the time that we filed our initial TRO and at the time that the Court ordered that plaintiffs were enjoined from implementation of the directive that they would use that opportunity to further

pressure employees into taking the deferred resignation offer.

In fact, that's exactly what they did. The emails went out from OPM and from their surrogates notifying employees that this directive had been extended and soliciting and encouraging and seeking additional resignations.

Your Honor, that is why plaintiffs are seeking additional relief here because it is plain that OPM, not plaintiffs, is seeking to use any additional relief to put additional pressure on employees, something that will cause additional irreparable harm to plaintiffs.

02:49PM

Second, your Honor, they cite the TRO from Judge Bates. I will read from that decision right here. Judge Bates states that, "Nowhere does the record state that the union in question or any other plaintiff will use its resources to counteract the harm caused by the defendant's challenged conduct." That is in direct contrast to numerous paragraphs of plaintiffs's verified complaint.

Next, Judge Bates's decision notes that nor does plaintiffs's motion even allege that any of them will divert

02:50PM

resources. Again, that is in direct contrast to the allegations that plaintiffs have raised here. That TRO denial has no bearing on plaintiffs's allegations in this case in which we have outlined very specifically the harm that plaintiffs will experience absent a TRO.

Second, your Honor, they argue that plaintiffs, or,

third, they argue that plaintiffs lack standing, that the plaintiffs are essentially spending their way into standing in this case, and they cite the *Alliance for Hippocratic Medicine* case, but that case was different. That organization did not have organizational business streams. They were an organization that was solely an advocacy organization in contrast with the *Havens* plaintiffs that had as one of their core business functions providing advice and counseling.

Here, this is not a self-inflicted harm. Plaintiff unions have a duty to provide advice and counsel, a duty of fair representation to their members, and a duty to provide these services to their affiliates, and this is something that these unions have been doing for many years. It is part of their core business function, and it is that core business function, one of them that is being undermined here.

And the issue here is not that plaintiffs object to getting questions or counseling their members or affiliates, that is what they do, that it is a part of what they do, but what they are experiencing now in an unprecedented two-week period, where defendants have put this explosive offer concerning their members and employees's very livelihoods, and given them just days to make that decision, and then repeatedly change the guidance as to what was being offered day by day as that offer continued. That is a different situation than the vast majority.

And that is part, your Honor, why they're concerned that this would somehow result in circumventing standing, unions turning up to challenge every little thing is not the case.

The question of injury and fact is an essential part of this test, and in the vast majority of typical cases, unions as organizational plaintiffs will not be able to show that they have suffered organizational harm, but this case is not typical, your Honor, this is an unprecedented program promulgated not by agencies but by OPM under a short two-week deadline that has caused harm to the plaintiffs as organization.

Your Honor, I believe I've adequately covered jurisdiction, but I do want to talk for a moment about their Anti-Deficiency Act argument. They're saying that their action here does not change the federal government's obligations to employees, but that is not what they are telling employees, and that is not the agreement that individuals are accepting.

Their website, even now, in the FAQ asks, "Will I really get paid?" The answer to that is an unequivocal yes, your Honor. That is not how regular employees are treated. You may make a job offer to someone to start in April, but the form job offers that I've received from the federal government say that that is subject to appropriation, and as we've seen, the federal government has shown no reluctance to rescind job

offers from individuals before they've actually started, even not subject to appropriations. They are prioritizing these individuals and putting them in a separate category and saying that they will receive all of their benefits and pay through September 30th in an unequivocal fashion. That is what the APA recognizes.

Lastly, your Honor, or almost lastly, your Honor, they make the same argument with respect to irreparable harm that it will only be exacerbated here, but here, as defendants have just conceded in their argument, they anticipate that in the last hours of the program, they will receive the most uptick to the program.

02:54PM

That concession alone, your Honor, is sufficient to find that there is irreparable harm if this Court reinstates that deadline now.

In addition, they overlook the constantly changing guidance that means that even if there is no injunctive relief, we're effectively locking in and continuing the harm that plaintiffs will continue to get questions about what it is that folks agreed to, questions about what they've accepted, and they will not be able to counsel folks effectively.

02:55PM

The last argument or the second to last argument, your Honor regards balance of equities. They say that it will be enormously disruptive to the government to extend the deadline on this case.

Defendants have no right to rush out a program in two weeks that does not comply with requirements of reasoned agency decision-making and the Anti-Deficiency Act, and, in fact, the public's interest in the smooth functioning of government, particularly in light of this conduct, cuts against that argument.

The last argument they make is a new argument with respect to the President Article II arguments that does not appear in this brief. We would argue, as they do, that that argument would be waived, but even if it were not, your Honor, it is irrelevant.

02:56PM This case is not about executive power, this case is about agency action, and agencies under the APA are held to requirements of reasoned decision-making. This is also, their argument also ignores the fact that Congress has had a lot to say with respect to how the federal workplace works and what rules govern that, both with respect to requiring agencies like OPM to be bound by the Administrative Procedure Act and by the CSRA itself, which sets a host of requirements and due process protections and others on employees and on the federal workplace.

Your Honor, in conclusion, this is an unprecedented action taken on an unprecedented timeline that is causing serious and irreparable harm to plaintiffs in their capacity as organizations, and we ask that this Court enjoin that action

here.

THE COURT: I'll give you a brief response if you want.

MR. HAMILTON: Thank you, your Honor.

THE COURT: I can see you looking that way. Emphasis on briefly.

MR. HAMILTON: Yes, two very quick points. One on the scope for relief in the temporary restraining order. Plaintiffs suggested that there's no way that they could have known that the OPM and Mr. Ezell would have implemented the Fork In The Road Voluntary Resignation Program after your Honor entered his Thursday order orally, but I will just read from the proposed temporary restraining order, Docket 11.1. They wanted the February 6th deadline for federal employees to accept the directive stayed, which is exactly what defendants did, and the attachment to their reply brief is a revision of that request.

On the DDC decision of Judge Bates on Friday, the theory that Judge Bates rejected is very similar to the reputational harm that plaintiffs are claiming here that their questions and need to answer them is going to negatively affect the reputation they have with union membership.

And, finally, I just wanted to respond to some of plaintiffs's questions about how the program works by explaining that the Telework Enhancement Act gives the federal

government substantial discretion in determining who is and who is not subject to an in-office work policy, and, as I said, nothing about financial obligations of the federal government is changing, instead it is that work responsibilities are eliminated for those who choose to participate, and that is carried out by placing employees on administrative leave.

There's additional discussion of this in the February 4th OPM memo, of which there is a hyperlink in our brief.

02:59PM And, finally, I would just ask your Honor about comments that your Honor shared at the beginning of the hearing and the status of this and that your Honor is converting the requests for a TRO to a preliminary injunction?

THE COURT: Well, sort of. The TRO will continue until I resolve the issues that are presented, but I guess what I was saying, this is equivalent to a preliminary injunction because it's thorough, it's contested, and so on, so it's not converted right yet, but after something happens in the order, it may or may not, depending.

03:00PM MR. HAMILTON: Thank you for that clarification, your Honor.

THE COURT: A little mix-up in the terminology, I guess. We'll be in recess, thank you.

THE CLERK: All rise for the Honorable Court.

(Whereupon, the hearing was adjourned at 3:00 p.m.)

C E R T I F I C A T E

UNITED STATES DISTRICT COURT)
DISTRICT OF MASSACHUSETTS) ss.
CITY OF BOSTON)

I do hereby certify that the foregoing transcript, Pages 1 through 39 inclusive, was recorded by me stenographically at the time and place aforesaid in Civil Action No. 25-10276-GAO, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO vs. CHARLES EZELL, ACTING DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, and thereafter by me reduced to typewriting and is a true and accurate record of the proceedings.

Dated February 11, 2025.

s/s Valerie A. O'Hara

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VALERIE A. O'HARA

OFFICIAL COURT REPORTER

03:06PM